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10/817,303

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Joseph E. Owensby

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EXAMINER

LEFF, STEVEN N

ART UNIT

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1794

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PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/817,303	Applicant(s) OWENSBY, JOSEPH E.	
	Examiner STEVEN LEFF	Art Unit 1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 13 February 2008.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1,6-14 and 20-28 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1, 6-14, and 20-28 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date <u>2/13/08</u> . | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

- Claims 1, 7-9, 11-12 and 26 remain rejected under 35 U.S.C. 102(b) as being anticipated by Nahill et al. (6112925).

With respect to claim 1, 7-9, 11-12 and 26, Nahill et al. teach a container suitable for holding perishable food items. More specifically, Nahill et al. teach a tubular body portion (fig. 5 hand annotated) formed of molded thermoplastic polymer (col. 8 line 14+) having an arcuate top portion extending along a length of said body portion (fig. 5 hand annotated), two ends disposed on opposite ends of the arcuate top (fig. 5 hand annotated), and a bottom having a rectangular shaped flat portion (fig. 6a ref. #61), and having an undulating profile at each side of said flat portion forming a trough (fig. 6 hand annotated, the bottom 3 ribs in unison providing the undulating profile) where the flat portion and the trough extend between the opposite ends, said tubular body portion having a cross-section suitable for holding a perishable food item (col. 1 line 37+), wherein at least a portion of the tubular body portion is transparent (col. 9 line 54+), and where one end of said body portion is closed (fig. 6 hand annotated), and the other end of the body portion has an open mouth which is adapted to be sealed (fig. 6 hand annotated).

Nahill et al. continue by teaching an end cap for sealing the open mouth (col. 5 line 43) with screw threads (col. 5 line 43), where the screw threads provide a friction fit, and that the container comprises a lip projecting radially from the periphery of the mouth opening (fig. 6 hand annotated ref. #504). Nahill et al further teach that the tubular body portion defines outwardly sloping sides (fig. 5) and that the body is opaque (col. 9 line 56+).

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
 2. Ascertaining the differences between the prior art and the claims at issue.
 3. Resolving the level of ordinary skill in the pertinent art.
 4. Considering objective evidence present in the application indicating obviousness or nonobviousness.
- Claims 1, 6, 12-14, 20-25 and 27-28 are rejected under 35 U.S.C. 103(a) as being unpatentable over DeGroff (Des 479690) in view of Garwood (5514392).

With respect to claims 1, 6, 12-14, 20-25 and 27-28, DeGroff teach a container suitable for holding perishable food items. More specifically, DeGroff teach a tubular body portion (fig. 1 hand annotated) having an arcuate top portion extending along a length of said body portion (fig. 7 hand annotated), two ends (fig. 2 hand annotated), and a bottom having a rectangular shaped flat portion (hand annotated fig. 7), and having an undulating profile at each side of the flat portion forming a trough (fig. 7 hand annotated), where the flat portion and the trough extend between the opposite ends (fig. 7), said tubular body portion having a cross-section suitable for holding a perishable food item, and where one end of said body portion is closed (fig. 2 hand annotated), and the other end of the body portion has an open mouth which is adapted to be sealed (fig. 2 hand annotated).

DeGroff continue by teaching that the container comprises a lip projecting radially from the periphery of the mouth opening (fig. 2 hand annotated) that the tubular body portion defines outwardly sloping sides (fig. 5), and that the open mouth has a cross-section that is substantially equal to that of the tubular body portion (fig. 1). It is

noted that although DeGroff depicts the container in an upright fashion, the container of DeGroff is taken with respect to the hand annotated figures.

However DeGroff is silent with respect to the container being a molded thermoplastic polymer, that at least a portion of the tubular body portion is transparent, that a heat sealable film is used for sealing, that the container is suitable for holding perishable food items, specifically fresh red meat, that the interior of the body portion is coated with an anti-fogging agent, that the atmosphere of the container is manipulated to increase the oxygen content thereof, and that the meat is disposed on the flat bottom of the container such that a capacity of the container is only partially filled with the meat so the meat is recessed from the arcuate top, where the meat is specifically between 50% and 75% of the capacity of the container.

Garwood teaches a container being a molded thermoplastic polymer (col. 4 line 14+), that at least a portion of the tubular body portion is transparent (col. 4 line 14), that a heat sealable film is used for sealing (col. 6 line 65+), that the food item is specifically fresh red meat (col. 3 line 26) that the interior of the body portion is coated with an anti-fogging agent (col. 3 line 32+), that the atmosphere of the container is manipulated to increase the oxygen content thereof (col. 4 line 7+), and that the meat is disposed on the flat bottom of the container such that a capacity of the container is only partially filled with the meat so the meat is recessed from the arcuate top (col. 4 line 9+), where the meat is specifically between 50% and 75% of the capacity of the container (col. 4 line 9+).

Therefore although DeGroff is silent with respect to the container being made of a molded thermoplastic polymer, one of ordinary skill in the art would have been motivated to combine the teachings of DeGroff and Garwood, since DeGroff provides all of the structural limitations taught by the applicant, where it is further noted that in order to provide the shape of the container as taught by DeGroff the container would be molded to provide the specific structure and since Garwood does specifically teach that the container is made of a molded thermoplastic polymer (col. 2 line 10+) thereby providing a relatively impermeable material which has maintains a specific shape (col. 3 line 25).

Thus it would have been obvious to one of ordinary skill in the art at the time of the invention by the applicant to have taught the container being made of a molded thermoplastic polymer since both DeGroff and Garwood teach food containers, since DeGroff teaches a specific design, and since Garwood does specifically teach the

advantage of using a molded thermoplastic polymer for its art recognized and applicant's intended purpose of providing a relatively impermeable material which has maintains a specific shape as is taught by Garwood (col. 3 line 25).

Therefore although DeGroff is silent with respect to a heat sealable film being used for sealing, one of ordinary skill in the art would have been motivated to combine the teachings of DeGroff and Garwood et al., since DeGroff provides all of the structural limitations taught by the applicant, with respect to a food container, since DeGroff teaches an open end (fig. 1), where it is a known desirable feature to provide a closure for food containers, and since Garwood does specifically teach that the container is sealed with a heat sealable (col. 2 line 4+) for its art recognized and applicant's intended purpose of maintaining the freshness of perishable foods (col. 3 line 22+)

Thus it would have been obvious to one of ordinary skill in the art at the time of the invention by the applicant to have taught that a heat sealable film is used for sealing since both DeGroff and Garwood teach food containers, since DeGroff teaches an open end (fig. 1), where it is a known desirable feature to provide a closure for food containers, and since Garwood does specifically teach the advantage of sealing the container with a heat sealable (col. 2 line 4+) thereby providing a container which increases the shelf life of the of perishable foods (col. 3 line 22+) since the product remains "fresh" for a longer period of time due to the container being sealed from the ambient environment thus ultimately increasing sales as the perishable food has an increased shelf-life.

It would have further been obvious to one of ordinary skill in the art at the time of the invention by the applicant to have taught that at least a portion of the tubular body portion is transparent, since both DeGroff and Garwood teach food containers, since DeGroff teach all of the structural limitations of the container (fig. 1), where it is a known desirable feature to provide a transparent food container, as is taught by Garwood (col. 2 line 19+) in order to provide a container which allows the contents thereof to be viewed by the consumer prior to purchasing.

It would have further been obvious to one of ordinary skill in the art at the time of the invention by the applicant to have taught that that the food item is specifically fresh red meat, since both DeGroff and Garwood teach containers, since DeGroff teach all of the structural limitations of the container (fig. 1), where it is a known desirable feature to

provide a fresh red meat container, as is taught by Garwood (col. 3 line 23+) in order to maintain the freshness of perishable foods specifically fresh red meat (col. 3 line 23+), where MPEP 2144.07 states that the selection of a specific food based on its suitability for its intended use supports a prima facie obviousness determination.

Further, although DeGroff is silent with respect to teaching that the atmosphere of the container is manipulated to increase the oxygen content thereof, DeGroff does teach a food container (title) and where Garwood does specifically teach that the atmosphere of the container is manipulated to increase the oxygen content thereof (col. 4 line 1+), one of ordinary skill in the art at the time of the invention by the applicant would have been motivated to combine the teachings of DeGroff and Garwood in order to provide a container for its art recognized and applicant's intended purpose of increasing the shelf of red meat (col. 1 line 20+).

Thus it would have been obvious to one of ordinary skill in the art at the time of the invention by the applicant to teach that the atmosphere of the container is manipulated to increase the oxygen content thereof since both DeGroff and Garwood teach the general practice of providing a food container, and since Garwood teaches that the atmosphere of the container is manipulated to increase the oxygen content thereof for its art recognized and applicant's intended purpose of increasing the shelf of red meat, thereby increasing profits since the meat is more visually appealing to the consumer (col. 1 line 20+).

It is further noted that in order to increase the appeal of the fresh red meat within the container, the consumer must be able to see the meat when stored in a cold climate where the thermoplastic may "fog up". Therefore although DeGroff is silent with respect to providing an anti-fogging coating, Garwood does specifically teach providing an anti-fogging coating (col. 3 line 32), one of ordinary skill in the art would have been motivated to combine the teachings of DeGroff and Garwood due to the fact that the anti-fogging coating would ensure that the meat product within the container was visible to the consumer.

Thus it would have been obvious to one of ordinary skill in the art at the time of the invention by applicant to teach the application of an anti-fogging agent since the anti-fogging agent would increase the ability of the consumer to see the product, thereby achieving the purpose of manipulating the atmosphere within the container, which is to increase the sales due to the fact that the meat looks fresh longer and the consumer is able

to see the meat through the container without fogging due to the refrigerated atmosphere and the formation of condensation on the interior of the packaging.

Regarding that the capacity of the container is only partially filled with the meat so the meat is recessed from the arcuate top, where the meat is specifically between 50% and 75% of the capacity of the container, although DeGroff is silent with respect to this limitation, DeGroff does teach a food container, where Garwood does teach of the container is only partially filled with the meat so the meat is recessed from the arcuate top (col. 4 line 1) for its art recognized and applicant's intended purpose of providing a space between the arcuate top and the meat product since the gas in the space is provided in order to increase the keeping qualities of the meat (col. 4 line 1+). Therefore one of ordinary skill in the art at the time of the invention by the applicant would have been motivated to combine the teachings of DeGroff and Garwood in order to provide a container for its art recognized and applicant's intended purpose of increasing the shelf of red meat due to the space between the top and the food itself.

It would have thus been obvious to one of ordinary skill in the art at the time of the invention by the applicant to teach that the meat is disposed on the flat bottom of the container such that a capacity of the capacity of the container is only partially filled with the meat so the meat is recessed from the arcuate top, and that the meat is specifically between 50% and 75% of the capacity of the container, since DeGroff does teach a food container, where the bottom of the container is dependant upon the size of the meat and its placement within the container, and where Garwood does teach that the container is only partially filled with the meat so the meat is recessed from the arcuate top (col. 4 line 1) for its art recognized and applicant's intended purpose of increasing the shelf of red meat, where the shelf life of the meat is increased due to the gas which is in the space between the top and the meat, as is taught specifically by Garwood (col. 4 line 1+) thereby increasing the profits since the meat is more visually appealing to the consumer for a longer duration of shelf time.

- Claim 10 is rejected under 35 U.S.C. 103(a) as being unpatentable over DeGroff (Des 375873) and Garwood (3480197) and in further view of Jarvis (4112124).

DeGroff and Garwood are taken as above, however both are silent with respect to the container having indica.

With respect to claim 10, Jarvis teaches that the container has indicia (fig. 6 col. 11 line 64). Therefore although neither DeGroff nor Garwood teach that the container has indicia, both DeGroff and Garwood teach a meat product in a container, and where Jarvis does specifically teach that the container has indicia (fig. 6 col. 11 line 64) one of ordinary skill in the art at the time of the invention by the applicant would have been motivated to combine the teachings of DeGroff, Garwood and Jarvis and taught that the container has indicia, for its art recognized and applicant's intended purpose of increasing the visual appearance of the container.

Thus it would have been obvious to one of ordinary skill in the art to teach that the container has indicia, in order to increase the containers appeal to the consumer since its more visually appealing thereby increasing overall sales. Further MPEP 2144.04 I states that "matters relating to ornamentation only which have no mechanical function cannot be relied upon to patentably distinguish the claimed invention from the prior art."

Response to Arguments

Applicant's arguments filed have been fully considered but they are not persuasive. With respect to applicant's argument that the Nahill does not teach a flat bottom it is noted with respect to fig. 6, and fig. 6a" that Nahill has a rectangular projection and as is depicted in fig. 6 by the cross section, the container of Nahill would rest on the flat portion of the rectangular projection thus positively teaching a flat bottom portion.

With respect to applicant's argument that the flat bottom and trough of Nahill do not extend between opposite ends of the container, it is noted that as is depicted in figure 5 that the flat bottom portion and the trough which are represented by reference no. 60 in fig. 5, clearly extend or run along the length of the opposite ends of the container, i.e. ends 45 and 52 and thus "extend between said opposite ends".

In response to applicant's argument that the references fail to show certain features of applicant's invention, it is noted that the features upon which applicant relies (i.e., rectangle area extends along its entire length) are not recited in the rejected claim(s) as the claim requires only that the rectangular area extend "between" ends. Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993).

Applicant's arguments with respect to Ahern et al. have been considered and are persuasive. Therefore, the rejection has been withdrawn. However, upon further consideration, a new ground(s) of rejection is made in view of DeGroff.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Steven Leff whose telephone number is (571) 272-6527. The examiner can normally be reached on Mon-Fri 8:30 - 5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Callie Shosho can be reached at (571) 272-1123. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Drew E Becker/

Primary Examiner, Art Unit 1794

/S. L./

Examiner, Art Unit 1794